(39681) SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 992

NEW YORK FEED COMPANY, INC., et ano.,

Appellants,

—against—

HOWARD R. LEARY, et ano.,

Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC., et al.,

Appellants,

—against—

HOWARD R. LEARY, et ano.,

Appellees.

MOTION TO AFFIRM

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In these consolidated cases, considered together by the court below, the appellee Leary moves to affirm both cases pursuant to Rule 16 of the Rules of this Court on the ground that the questions presented are so insubstantial as not to need further argument.

Statement of the Case

The relevant facts in both cases are adequately stated in the opinion of the court below (3a *et seq.*)*

ARGUMENT

The questions raised by appellants lack substantiality.

a. The New York obscenity statute involved is constitutional.

The New York statute rests on a definition of obscenity which conforms with the decision of this Court. It is based primarily on *Roth* v. *United States*, 354 U. S. 476 (1957), as elaborated on in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). In the latter case this Court said (p. 418):

> "We defined obscenity in *Roth* in the following terms:
>
> '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relat-

* References followed by the letter "a" are to pages of the Appendix to the jurisdictional statement in the *Milky Way Productions* case.

> ing to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

New York Penal Law, Section 235.00, defines "obscene" as follows:

> "1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

This is still the proper constitutional test of obscenity. *Stanley* v. *Georgia*, 394 U. S. 557, 568 (1969) ("*Roth* and the cases following that decision are not impaired by today's holding"); *Miskin* v. *New York*, 383 U. S. 502, 507 (1966) ("The First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the *Roth* definition of obscenity"). See, also, *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964).

Where, however, all three elements of the *Roth* test are *not* present as, for example, where the publication has a:

> "minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evi-

> dence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance." *Memoirs, supra,* 383 U. S. at p. 420.

The application of this "pandering" concept was further explained in *Ginzberg* v. *United States,* 383 U. S. 463, 474 (1966): "* * * in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." The Court explained that "such evidence may support the determination that the material is obscene *even though in other contexts the material would escape such condemnation.*" (*id.* at p. 476, emphasis supplied.)

Appellants argue, however, that this Court mandated two additional tests in *Redrup* v. *New York,* 386 U. S. 767 (1967), and that the absence of these additional requirements in New York's Penal Law makes it constitutionally defective. Appellants have misread *Redrup.* That case noted the different views of the Justices and held that the publications therein were not obscene "[w]hichever of these constitutional views is brought to bear upon the cases before us" (*id.* at p. 771). None of the constitutional views expressed in *Redrup* dealt with additional requirements for a finding of obscenity. The Court in *Redrup* noted, however, the absence therein of any evidence of pandering, foisting on an unwilling public, or sale to minors.

Appellants find support for their misconceived conclusion that *Redrup* restricts obscenity to only those publications which pander, are sold to minors or are foisted upon an unwilling public in a partial, out of context quo-

tation from the *Stanley* case. This Court, in discussing the *Roth* holding, stated that it was not necessary to prove that "exposure to obscene material would create a clear and present danger of antisocial conduct" (394 U. S. at p. 567). It went on to point out that *Roth* involved public distribution and that public distribution is always subject to the "danger that obscene material might fall into the hands of children * * * or that it might intrude upon the sensibilites or privacy of the general public" (*Ibid.*).

The District Court properly rejected appellants' argument and issued a declaratory ruling that New York's statutory definition of obscenity is constitutionally sufficient.

b. An adversary hearing is not required prior to the issuance of arrest warrants for violation of the obscenity law here involved.

Although it has been held that an adversary hearing must be held before allegedly obscene material is seized, this Court has not held that such a hearing must be had before an arrest can be made for violation of an obscenity statute. And all of the lower court cases relied on by appellants appear to have involved situations in which there were seizures.

It is undoubtedly true that arrests may have some "chilling effect" on the exercise of First Amendment rights. But the existence of a statute making distribution of obscene material a crime also has such an effect. A prior adversary hearing is not required merely because the existence of a statute or the making of arrests under the statute may make people hesitate before distributing material that might be regarded as violative of the statute.

A similar "chilling effect" argument was advanced and rejected in *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.C. Cir.,1967), affd. 390 U. S. 457 (1968).

Nor is there any valid basis for appellants' assertion that there were mass arrests. On two separate dates, June 26, 1969, and August 15, 1969, there were a total of only thirteen arrests of newsdealers in New York City, as noted in the opinion of the court below.

c. The presumption of knowledge of the content and character of obscene material by a person promoting such material has not been shown to be unconstitutional.

In the *New York Feed Company* case it is argued that the presumption in N. Y. Penal Law, Section 235.10 is unconstitutional (Juris. Statement, p. 20). In support of this contention it relies on *Leary* v. *United States*, 395 U. S. 6 (1969). That case and the cases discussed in it merely hold that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" (p. 36). Here the appellant has not shown that the presumed fact is *not* more likely than not to flow from the proved fact. Nor can it be said that the presumption is so obviously irrational on its face that it must be stricken.

Moreover, the presumption is being attacked in an action brought by the publishers of the allegedly obscene material. It seems obvious that the presumption is rational with respect to the publishers.

CONCLUSION

The motion to affirm should be granted.

February 12, 1970.

Respectfully submitted,

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